A

HO KEN SENG

v.

PROGRESSIVE INSURANCE SDN BHD

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (M)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
HASAN LAH FCJ
C JEFFREY TAN FCJ
[CIVIL APPEAL NO: 03(i)-4-07-2012-(B)]
10 JANUARY 2013

D ***BANKRUPTCY:*** *Practice and procedure - Appeal - Whether appeal by bankrupt under s. 92(2) Bankruptcy Act 1967 ('Act') required prior sanction of Director-General of Insolvency under s. 38(1)(a) of Act - Whether 'action' in s. 38(1)(a) referable to action upon which bankruptcy was secured - Whether s. 38(1)(a) scope should be limited to new chose in action affecting assets or proprietary rights of bankrupt intended for*
E *distribution to creditors*

The appellant lost in his appeals to the judge in chambers against the registrar's decision adjudging him a bankrupt and dismissing his application to strike out/set aside the bankruptcy notice and
F creditor's petition and their service. When he appealed to the Court of Appeal against those decisions, the respondent applied to strike out the appeals on the basis that he had no *locus standi* to appeal as he had not obtained prior sanction from the Director-General of Insolvency ('DGI') to proceed with the appeals
G pursuant to s. 38(1)(a) of the Bankruptcy Act 1967 ('the Act'). The majority of the Court of Appeal allowed the respondent's application and struck out the appeals holding the appellant's filing and prosecuting of the appeals came within the ambit of "maintaining an action" under s. 38(1)(a) of the Act. The minority
H judgment held a bankrupt could challenge all orders made by the Court in the exercise of its bankruptcy jurisdiction, including appeals and even applications to set aside a judgment forming the subject-matter of the bankruptcy proceedings, without the need to obtain prior sanction of the DGI. The appellant was granted leave
I to appeal to the Federal Court on the question of whether he was competent to prosecute his appeal under s. 92(2) of the Act without having first obtained the DGI's sanction under s. 38(1)(a) of the Act.

Held (allowing appeal with costs)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering judgment of the court:

(1) An undischarged bankrupt when exercising his rights under s. 92(2) of the Act to appeal any order made by the court under its bankruptcy jurisdiction was not required to obtain the previous sanction of the DGI pursuant to s. 38(1)(a) of the Act. (paras 3 & 34)

(2) Section 38(1)(a) should not be given too extensive an interpretation. While the word 'action' should refer to civil action or civil proceedings in court, it should be restricted to a new and separate action and not the same upon which the bankruptcy was secured. The scope of s. 38(1)(a), other than the saving clause therein, should be limited to a new chose in action that could affect the assets or proprietary rights of a bankrupt intended for distribution to his creditors. (paras 27 & 28).

(3) It would be most unfair and unconscionable if a person was disabled and incapacitated, unless he obtained sanction from the DGI, from challenging the very action that caused the disability and incapacitation. It was tantamount to denying him his right of access to justice and probably his constitutional right of appeal. (para 30)

(4) As all assets of a person upon bankruptcy vested with the DGI who in turn was statutorily required to protect the interests of the creditors of the bankrupt, the DGI would be put in an awkward or conflict-of-interest situation when he is asked to sanction a step to be taken by a bankrupt that may run counter to the interests of the creditors. (para 32).

[Note: The Federal Court affirmed the decision in Re Lim Tai Nian, ex p Kewangan Utama Bhd [2002] 1 CLJ 41 with regard to a bankrupt's competency to appeal against an order made in bankruptcy without the need to obtain the DGI's sanction and overruled the decisions on the point in Low Kok Tuan ex-parte Arab Malaysian Merchant Bank Bhd [1997] 4 CLJ 185 and Bathamani Suppiah v. Southern Finance Company Bhd [2002] 2 CLJ 650 and such other cases that followed them]. (see para 26 of judgment)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah gagal dalam rayuannya kepada hakim dalam kamar terhadap keputusan pendaftar yang mengisytiharkannya sebagai seorang bankrap dan menolak permohonannya untuk mengenepikan notis kebankrapan, petisyen pemiutang serta penyerahan dokumen-dokumen yang berkaitan ke atasnya. Apabila perayu merayu ke Mahkamah Rayuan terhadap keputusan hakim, responden memohon supaya rayuan dibatalkan atas alasan bahawa perayu tidak mempunyai *locus standi* untuk merayu disebabkan beliau tidak terlebih dahulu mendapatkan sanksi untuk merayu dari Ketua Pengarah Insolvensi ('KPI') di bawah s. 38(1)(a) Akta Kebankrapan 1967 ('Akta'). Mahkamah Rayuan, melalui suatu keputusan majoriti, telah membenarkan permohonan responden sekaligus membatalkan rayuan dengan alasan bahawa pemfailan dan pendakwaan rayuan oleh perayu terangkum ke dalam "maintaining an action" di bawah s. 38(1)(a) Akta. Apapun, keputusan minoriti berpendapat bahawa seorang bankrap boleh mencabar semua perintah yang dibuat oleh mahkamah dalam pelaksanaan bidangkuasa kebankrapannya, termasuk rayuan-rayuan dan malah meliputi juga permohonan-permohonan untuk mengenepikan penghakiman yang menjadi hal perkara kebankrapan, tanpa perlu mendapatkan sanksi KPI terlebih dahulu. Perayu diberi kebenaran untuk merayu ke Mahkamah Persekutuan atas persoalan sama ada beliau berkompeten untuk mendakwa rayuannya di bawah s. 92(2) Akta tanpa terlebih dahulu mendapat sanksi KPI di bawah s. 38(1)(a) Akta.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Seorang bankrap yang belum dilepaskan, bilamana melaksanakan hak-haknya di bawah s. 92(2) Akta untuk merayu terhadap perintah-perintah yang dibuat oleh mahkamah dalam bidangkuasa kebankrapannya, tidak dikehendaki untuk mendapatkan sanksi terdahulu KPI di bawah s. 38(1)(a) Akta.

(2) Seksyen 38(1)(a) tidak harus diberikan pentafsiran yang terlalu panjang lebar. Sementara perkataan "tindakan" di situ merujuk kepada tindakan atau prosiding sivil di mahkamah, ia harus dihadkan kepada satu tindakan yang baharu dan berasingan

dan bukannya tindakan yang sama di atas mana kebankrapan telah diperolehi. Skop s. 38(1)(a), selain dari fasal pengecualiannya, harus dihad kepada suatu hak dalam tindakan yang boleh memberi kesan kepada hak kehartaan atau hak pemilikan si bankrap yang perlu diagih-agihkan kepada pemiutang-pemiutang.

(3) Adalah amat tidak adil dan tidak berhati budi jika seseorang dijadikan terhalang dan tidak berkeupayaan untuk mencabar sesuatu tindakan yang menyebabkannya berada dalam keadaan sedemikian kecuali jika beliau mendapatkan sanksi KPI terlebih dahulu. Ia samalah dengan menafikan haknya kepada keadilan dan mungkin juga hak keperlembagaannya untuk merayu.

(4) Oleh kerana semua aset seseorang sewaktu kebankrapan akan beralih kepada KPI yang pada masa sama dikehendaki melindungi kepentingan pemiutang-pemiutang si bankrap, maka KPI berada dalam satu situasi konflik-kepentingan apabila diminta untuk memberikan sanksi kepada tindakan yang hendak diambil oleh si bankrap yang mungkin bertentangan dengan kepentingan pemiutang-pemiutang.

[Catatan: Mahkamah Persekutuan telah mengesahkan keputusan di dalam Re Lim Tai Nian, ex p Kewangan Utama Bhd [2002] 1 CLJ 41 berkaitan dengan kekompetenan seorang bankrap untuk merayu terhadap perintah yang dibuat dalam posiding kebankrapan tanpa perlu mendapatkan sanksi KPI dan telah menolak keputusan di dalam Low Kok Tuan ex-parte Arab Malaysian Merchant Bank Bhd [1997] 4 CLJ 185 dan Bathamani Suppiah v. Southern Finance Company Bhd [2002] 2 CLJ 650, dan kes-kes lain yang mengikutinya, berkaitan persoalan ini].

Case(s) referred to:

Bathamani Suppiah v. Southern Finance Company Bhd [2000] 2 CLJ 650 HC ***(ovrd)***

Besime Kallaba v. Bashkim (Brian) Bylykbashi 265 DLR (4th) 320 ***(foll)***

Boaler v. Power and Ors [1910] 2 KB 229 ***(refd)***

In re Noble (A Bankrupt) [1964] 3 WLR 206 ***(refd)***

Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal [2009] 4 CLJ 34 CA ***(refd)***

Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd [1997] 3 CLJ Supp 174 HC ***(refd)***

Re Khoo Kim Hock [1974] 1 LNS 134 HC ***(foll)***

Re Lim Tai Nian, Ex P Kewangan Utama Bhd [2002] 1 CLJ 41 HC ***(foll)***

A *Re Low Kok Tuan Ex P Arab-Malaysian Merchant Bank Bhd [1997] 4 CLJ 185 HC* ***(ovrd)***
Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd [2010] 2 CLJ 661 FC ***(refd)***

Legislation referred to:
B Bankruptcy Act 1967, ss. 38(1)(a), 92(1), (2), 105(1)
Bankruptcy Rules 1969, rr. 89, 161, 195
Rules of Court of Appeal 1994, rr. 4, 76

For the appellant - S S Muker (GK Ganesan, Daljeet Singh Sachdev & S Singh Sagoo with him); M/s Daljeet Sachdev & Co
C *For the respondent - M Menon; M/s Jaffar & Menon*

[Appeal from Court of Appeal; Civil Appeal No: B-03-(IM)-82-2010]

Reported by Ashok Kumar

D

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

E **Introduction**

[1] On 5 July 2012 this court granted leave to the appellant to appeal against the majority decision of the Court of Appeal delivered on 11 November 2011.

F **[2]** The leave question allowed reads:

> whether an undischarged bankrupt when exercising his rights under Section 92 of the Bankruptcy Act 1967 to review, rescind or vary any order made by the Court under its bankruptcy
G jurisdiction is required to obtain the previous sanction of the Director General of Insolvency pursuant to Section 38(1)(a) of the Act.

[3] In the course of his submission we posed a question to
H learned counsel for the appellant on the scope of the leave question. Thereupon learned counsel agreed, without objection from learned counsel for the respondent, that it should be amended to read thus:

> whether an undischarged bankrupt when exercising his rights
I under Section 92 (2) of the Bankruptcy Act 1967 to **appeal** any order made by the Court under its bankruptcy jurisdiction is required to obtain the previous sanction of the Director General of Insolvency pursuant to Section 38(1)(a) of the Act. (emphasis added).

[4] It is therefore from the perspective of the amended question that we render this judgment.

Brief Background Facts

[5] On 20 March 1990 the respondent obtained judgment against the appellant in the sum of RM1,963,488.33 under Civil Suit No. D1-22-145-1990. Based on the judgment sum together with accrued interest and costs the total sum came up to RM2,835,179.38 upon which the respondent filed a Bankruptcy Notice (BN) and served it on the appellant. Thereafter a Bankruptcy Petition (BP) was filed and served on the appellant.

[6] On 28 February 2005 the appellant filed an application to strike out or set aside the BN and the BP including the services of the same. On 8 January 2007 the Senior Assistant Registrar (SAR) dismissed the application with costs. Dissatisfied with the dismissal the appellant filed an appeal to the judge in chambers.

[7] Meanwhile on 16 August 2007 the respondent obtained a Receiving Order and Adjudication Order (RO & AO) against the appellant.

[8] On 22 August 2007 the appellant appealed to the judge in chambers against the grant of the RO & AO. Subsequently, both appeals to the judge in chambers were dismissed on 11 March 2010.

[9] On 9 April 2010 the appellant filed a notice of appeal to the Court of Appeal. In turn, on 12 July 2011, the respondent filed a notice of motion to strike out the notice of appeal pursuant to rr. 4 and 76 of the Rules of Court of Appeal 1994. The basis of the application was that the appellant had no *locus standi* to pursue the appeal by reason of s. 38(1)(a) of the Bankruptcy Act 1967 (the Act).

[10] On 11 November 2011 the Court of Appeal by a majority judgment allowed the application to strike out the notice of appeal. It was held that 'the steps taken by the bankrupt in filing and prosecuting these two appeals as adumbrated above clearly come within the ambit of maintaining an action in s. 38(1)(a) ie, the requirement for the previous sanction of the DGI'. The reasoning

A in *Re Khoo Kim Hock* [1974] 1 LNS 134; [1974] 2 MLJ 29 was not followed. That case was perceived by the majority judgment as dealing with annulment of bankruptcy orders under ss. 92(1) and 105(1) of the Act. Further, it was held that section 38(1)(a) should prevail over s. 92 since the former is specific while the B latter is general.

[11] Meanwhile, the minority judgment held that 'the test propounded by Azmi J when properly applied enables a bankrupt to challenge all orders made by a Bankruptcy Court in the exercise C of its bankruptcy jurisdiction including appeals as in this case and even applications to set aside a judgment forming the subject matter of the bankruptcy proceedings without the need to obtain the sanction of the official assignee'.

D **[12]** Now, in *Re Khoo Kim Hock (supra)* Mohd Azmi J (as he then was) held that:

> Having considered the provisions of the Bankruptcy Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt E is seeking to challenge an order in bankruptcy, or where he is seeking the Court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in section 38 (1) (a) clearly indicates that the section is intended to apply only to actions for recovery of something – either real or personal – which can be turned into F assets such as a claim for recovery of property or money due. Further, there is nothing in sections 33, 92 or 105 to indicate that it is the intention of the legislature to require prior sanction of the Official Assignee before a bankrupt can seek relief under those provisions. Under section 33(1), a bankrupt may at any time after G being adjudged bankrupt apply to the Court for an order of discharge, and there is no legal requirement that for this purposes he should first obtain the sanction of anyone. This is also the case where an application is made to the Court under sections 92 (1) and 105(1) of the Act.

H **Contentions Of Parties**

[13] The argument of learned counsel for the appellant may be summarised as follows:

I (i) 'that to appeal, review, rescind or vary any order made by the Court under its bankruptcy jurisdiction under s. 92 of the Bankruptcy Act 1967 is not a 'proprietary right' that forms part of the estate of the bankrupt. Consequently it is not subject to s. 38';

(ii) that the word 'action' in s. 38 does not include the 'personal right of the bankrupt in appealing against the RO and AO or annulment' of the same;

(iii) that the 'right of appeal under s. 92 is a statutory right' and such right cannot be the subject of the dictate of the Director General of Insolvency; and

(iv) that the interpretation of s. 38 was correctly made in *Re Khoo Kim Hock (supra)*.

[14] Learned counsel for the respondent argued that the present statutory rules such as rr. 89, 161 and 195 of the Bankruptcy Rules 1969 do not give a bankrupt the right to appeal without the sanction of the Director General of Insolvency (DGI). He went on to say that s. 38(1)(a) of the Act applies to a bankrupt who may wish to appeal the grant of AO & RO made against him.

[15] Learned Senior Federal Counsel who appeared for the DGI supported the submission that sanction is not required for a bankrupt to prosecute his appeal on the grant of RO & AO made against him.

Decision Of This Court

[16] For convenience, the relevant statutory provisions of the Act are reproduced herein.

Section 38(1)(a):

> (1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;'

Section 92:

> (1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.
>
> (2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.

A (3) For the purposes of this section the Director General of Insolvency shall be deemed to be aggrieved by the refusal of any application made by him to the court.

Section 105(1):

B 105. (1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

[17] The main issue for consideration in this case is therefore D whether the appellant is competent to prosecute his appeal without first obtaining the sanction of the DGI by reason of s. 38(1)(a) in which the crucial phrase is ''incompetent to maintain any action ...'.

E **[18]** The majority judgment of the Court of Appeal held that he was not competent. Such conclusion was influenced by the reasoning that the words 'any action' in the section were interpreted to mean civil actions or civil proceedings and include the filing of a notice of appeal, an application for stay of the F bankruptcy proceedings, an application to set aside a default judgment upon which the bankruptcy proceedings are founded and a counterclaim. (See: *Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal* [2009] 4 CLJ 34 CA).

G **[19]** Although the decision of the Court of Appeal in *Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal (supra)* was subsequently reversed by this court in *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* [2010] 2 CLJ 661 FC it was inconsequential to the majority judgment in this case which maintained that this court in *Re Khoo Kim Hock (supra)* did not H rule on the issue of *locus standi* and thus the earlier ruling by the Court of Appeal in *Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal (supra)* remained intact. The majority judgment further opined that this court after holding that the annulment order was to operate retrospectively, only ordered that I the matter be 'remitted to the Court of Appeal for the same corum to hear and decide on the substantive issues of this appeal

based on the principles as determined that the annulment of the appellant's bankruptcy acts retrospectively'. And that the remittance was done because the 'Court of Appeal did not make any finding on the appeal in respect of Rayuan Sivil Mahkamah Persekutuan No. 02(f)-28-2009(W) (Rayuan Sivil Mahkamah Rayuan No. W-02-722-2007) since the appellant has no *locus standi* without the sanction from the official assignee'.

[20] With respect we are of the view that it is implicit in the said judgment of this court (*Sardar Mohd Roshan Khan (supra)*) that the issue of lack of *locus standi* is a non-starter. It would have been futile to remit that case if this court had concurred with the Court of Appeal on the issue of *locus standi*. Further, it also makes no sense to require the sanction of the DGI. The grant of the annulment order placed the appellant in that case to a position as if he were never a bankrupt.

[21] Similarly, if a bankrupt succeeds in his appeal to strike out or set aside the BN and the BP including the service of the same and/or to set aside the RO & AO made against him the effect should also be the same, that is, he should not have been made a bankrupt in the first place. (See: *In re Noble (A Bankrupt)* [1964] 3 WLR 206). As such, there would have been no reason for him to require the sanction of the DGI to appeal. Accordingly, had the majority judgment of the Court of Appeal in this case considered further the judgment of this court in *Sardar Mohd Roshan Khan (supra)* it might have come to a different conclusion.

[22] As regards to s. 38(1)(a) there are divergent views expressed by the lower courts on its proper construction and applicability *vis-à-vis* a bankrupt. But we note that some of the views were premised on different facts and circumstances such as applications to set aside default judgments upon which bankruptcy proceedings were commenced, applications for stay of bankruptcy proceedings or applications made pursuant to s. 92(1) of the Act which is for 'review, rescind or vary any order made'.

[23] In respect of s. 92(2) of the Act in which we are particularly concerned with, we note that views expressed on it are quite limited. Two contradictory judgments of the High Court come to mind.

[24] In *Bathamani Suppiah v. Southern Finance Company Bhd* [2002] 2 CLJ 650 HC the presiding learned judge said this at p. 652:

> In my judgment it is trite law, that upon a person being adjudged a bankrupt all his affairs are vested with the official assignee. I am mindful of the case of *Khoo Kim Hock* [1974] 2 MLJ 29 which merely says that the prohibition of s. 38(1)(a) Bankruptcy Act 1967 does not exclude a bankrupt from applying for a review, rescission, or variation of an order of bankruptcy under s. 92(1), or s. 105(1) Bankruptcy Act 1967, but the case is silent on the bankrupt's capacity to appeal, or for that matter to apply to stay proceedings, without the sanction of the official assignee. This issue was equally ventilated by my learned brother Dato' Low Hop Bing J in the case of *Low Kok Tuan ex-parte Arab Malaysia Merchant Bank Bhd* [1997] 4 CLJ 185. Like my brother judge I am equally of the view, that this deliberate omission by the legislature in regard to appeals or stay in s. 92(1) and s. 105(1) Bankruptcy Act, would mean only one thing, that unlike provisions for review, rescinding, varying or annulling a bankruptcy order, for purposes of appeal against a bankruptcy order, sanction of the official assignee should be obtained. That being the case, I hold for the present the appellant lacks the legal capacity to lodge the appeal.

[25] But in *Re Lim Tai Nian, Ex P Kewangan Utama Bhd* [2002] 1 CLJ 41 the learned presiding judge opined otherwise and said this at p. 45:

> Clearly then, on the authority of *Re Khoo Kim Hock* an appeal by an undischarged bankrupt is not caught by s. 38(1) and therefore no prior sanction of the official assignee is required. Section 92 is in substance the same as the English s. 108 where the bankrupt in *In re Baron* was able to appeal without any sanction. Now s. 92 is not concerned only with adjudication orders only but with "order made ... under its bankruptcy jurisdiction" and "orders in bankruptcy matters". The plain and simple meaning of those terms would include, for example, order of stay or refusal of stay or order of extension or refusal of extension of time to do sometime. Therefore, I am unable to agree with *Re Low Kok Tuan* which, though it did not disagree with *Re Khoo Kim Hock*, decided that an undischarged bankrupt cannot appeal against an order refusing a stay of the bankruptcy petition. After all, the right to appeal is not a chose in action that can be vested in the official assignee as said in *Re Khoo Kim Hock*. For those reasons too, I am unable to agree with *Bathamani*. At the hearing of the

bankruptcy petition, the official assignee is required to state whether he supports the making of a receiving and adjudication order and if the papers are in order, he would invariably support the making of such an order. It would be perverse to expect him to sanction an appeal against the very order which he had supported. Therefore, it is unthinkable that he would give his sanction and this means that a bankrupt can never appeal against an order made against him, no matter if there is injustice in the making of the order. Such a construction of the law should not be had. For that reason too I am unable to agree with the said two decisions. Therefore, I am of the view that an undischarged bankrupt has a right to appeal against any order made by the court in exercise of its bankruptcy jurisdiction and he need not apply for any prior sanction before doing so.

[26] Having read and re-read the two judgments and having given them our careful and anxious consideration, we are inclined to agree with the reasoning of the learned judge in *Re Lim Tai Nian, Ex P Kewangan Utama Bhd (supra)*. We therefore rule that the decisions in *Re Low Kok Tuan Ex P Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185, *Bathamani Suppiah v. Southern Finance Company Bhd* [2002] 2 CLJ 650 and such other cases that followed them are no longer the law and we overrule them.

[27] In addition, in our view s. 38(1)(a) should not be given too extensive an interpretation.

[28] While we agree that the word 'action' therein should refer to civil action or civil proceeding in court (see: *Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174), it should be restricted to a new and separate action and not the same upon which the bankruptcy was secured. We would think that the scope of s. 38(1)(a), other than the saving clause therein, should be limited to a new chose in action that could affect the assets or proprietary rights of a bankrupt intended for distribution to his creditors. (See: *Boaler v. Power and Ors* [1910] 2 KB 229).

[29] As such, s. 38(1)(a) of the Act is not relevant when a bankrupt, an aggrieved person, invokes s. 92(2) of the same Act. To that extent we agree with the decision in *Re Khoo Kim Hock (supra)* and the minority judgment of the Court of Appeal in this case.

[30] It would be most unfair and unconscionable if a person is being disabled and incapacitated, unless he obtains sanction from the DGI, to challenge the very action that caused the disability and incapacitation. It would tantamount to denying him his right of access to justice and probably his constitutional right of appeal.

[31] Indeed we would think that the rationale in the case of *Besime Kallaba v. Bashkim (Brian) Bylykbashi* 265 DLR (4th) 320, though a Canadian vexatious litigant case, can be adopted and applied to this bankruptcy case. In that case this is what EA Cronk and RG Juriansz JJA said:

> The issue, then, is whether a vexatious litigant order operates to preclude an appeal therefrom to this court, absent leave to appeal. We do not think that the effect of a s. 140(1) order extends so far as to require leave to appeal from the very order that declares a person to be a vexatious litigant and restricts his or her right to access the courts.
>
> ...
>
> This court generally will require leave to appeal where a litigant seeks to initiate or continue litigation after a vexatious litigant order has been made against the litigant. However, no case was cited in argument before us in support of the proposition that leave to appeal is similarly required when the proposed appeal is from a vexatious litigant order itself. To the contrary, this court has entertained appeals from vexatious litigant orders without the requirement of leave to appeal.
>
> 34 We conclude that leave to appeal the vexatious litigant order was not required. Accordingly, it presents no bar to the determination of the appeal therefrom on the merits.

[32] It should also be remembered that upon the bankruptcy of a person, all his assets are vested with the DGI who in turn is expected, as is his statutory duty, to protect the interest of the creditors of the bankrupt. As such the DGI would be put in an awkward or in a conflict of interest situation when he is being asked to sanction a step to be taken by a bankrupt that may run counter to the interest of the creditors.

[33] Probably it is for such reason that the Senior Federal Counsel who appeared for the DGI in this case stood up to inform this court that sanction is not required for the appellant to

appeal against the bankruptcy order made against him. If the DGI said that no sanction is required from him we find no basis for the respondent to insist on sanction.

[34] Thus for the reasons given above we answer the question posed as amended in the negative. Since the merit of this appeal has not been heard by the Court of Appeal we hereby, order that it should be remitted and heard by another panel of the Court of Appeal.

[35] We therefore allow this appeal with costs and call upon the parties to address us on the quantum for costs.